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No. 95-1649

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF KANSAS, *Petitioner,*

v.

LEROY HENDRICKS, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KANSAS

BRIEF OF WASHINGTON LEGAL FOUNDATION; U.S. REPS. SAM BROWNBACK, JAN MEYERS, PAT ROBERTS, AND TODD TIAHRT; KANSAS LEGISLATORS TIM EMERT, MICHAEL R. O'NEAL, AND JENE VICKREY; FAMILIES & FRIENDS OF VIOLENT CRIME VICTIMS; THE MARYLAND COALITION AGAINST CRIME; AND THE STEPHANIE ROPER COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici address the following issue only:

Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* -- which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder; and (2) to present a continuing danger to society through a likelihood of committing future sexually violent offenses -- violate substantive due process principles?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to criminal justice

reform and crime victims' rights. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising important criminal justice issues. *See, e.g., Felker v. Turpin,* 116 S. Ct. 2333 (1996); *United States v. Armstrong,* 116 S. Ct. 1480 (1996); and *Payne v. Tennessee,* 501 U.S. 808 (1991).

U.S. Representatives Sam Brownback, Jan Meyers, Pat Roberts, and Todd Tiahrt are Members of Congress from Kansas. They support the right of the State of Kansas to take appropriate measures to protect its citizens from the actions of sexually violent predators.

Sen. Tim Emert, Rep. Michael R. O'Neal, and Rep. Jene Vickrey are members of the Kansas legislature. All three played an active role in the legislature's adoption of the Kansas Sexually Violent Predator Act. Rep. O'Neal is Chairman of the House Judiciary Committee, which had jurisdiction over the Act prior to its adoption.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland, which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Committee has worked for the adoption of victim rights legislation, both at the state and federal levels. The Committee (together with its sister organization, the Stephanie Roper Foundation, which has more than 11,000 members in all 50 states) provides a broad array of services to crime victims.

The Maryland Coalition Against Crime is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It devoted considerable resources

toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

Families & Friends of Violent Crime Victims is a nonprofit organization providing assistance, support, and information to thousands of victims each year throughout the State of Washington. The organization was formed in 1975 following the tragic disappearances and deaths of several Seattle area girls. Families & Friends has been a supporter of the State of Washington's sexual predator law, which was the model for Kansas's legislation and which was recently declared unconstitutional by a federal district judge.

Amici are deeply concerned by the level of sexually oriented violent crime being committed in our society. Statistics indicate that those committing such crimes tend to be repeat offenders who have demonstrated an inability to control their antisocial behavior. *Amici* believe that the only way to protect the general public from such crimes is to incapacitate those shown highly likely to commit such crimes until they can be taught to conform their conduct to societal norms.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Respondent Leroy Hendricks is a 62-year-old man who has molested children throughout his adult life.

In 1955, he pleaded guilty to indecent exposure after exposing his genitals to two young girls. In 1960, he was imprisoned for three years for molesting two young boys while he worked for a carnival. Soon after his release in 1963, he was arrested for molesting a seven-year-old girl and again imprisoned. He was imprisoned from 1967 to 1972 for molesting another young boy and girl. He began molesting his stepchildren soon after his release in 1972, and continued doing so until his conviction and incarceration in 1984. Petition Appendix (Pet. App.) 30a. He remained in prison based on that latest crime until his scheduled release date in 1994.

The Kansas legislature adopted in 1994 the Kansas Sexually Violent Predator Act (the "Act"), Kan. Stat. Ann. § 59-29a01, *et seq.*, to address the public safety problems caused by recidivist sexual offenders. The Act provides for the incapacitation and treatment (with a goal of eventual release) of anyone found to be a "sexually violent predator." The Act defines a "sexually violent predator" as anyone:

(1) who has been "convicted or charged with a sexually violent offense" and

(2) "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."

K.S.A. § 59-29a02(a). Included within the Act's definition of "sexually violent offense" is at least one of the crimes of which Hendricks has been convicted. K.S.A. § 21-3503. The Act includes numerous procedural safeguards for those subject to its terms, including the right to counsel during any commitment proceedings, the right to a jury trial, and

a prohibition against incapacitation unless the person subject to the law is found "beyond a reasonable doubt" to be a "sexually violent predator." Pet. App. 7a-8a.

Those incapacitated under the Act have the right to treatment of their mental abnormality/personality disorder and to release as soon as their mental condition "has so changed that the person is safe to be at large." K.S.A. § 59-29a07. Continued incapacitation is subject to mandatory annual review; if the court conducting the review determines that probable cause exists that the incapacitated person "will not engage in acts of sexual violence if discharged," the person is entitled to a hearing with the full panoply of procedural protections that were in place for the initial hearing. K.S.A. § 59-29a08.

In 1994, as Hendricks was about to be released from his most recent criminal incarceration, Kansas brought proceedings against him under the Act. At his incapacitation hearing, Hendricks stated that when he gets "stressed out" he is "unable to control the urge to engage in sexual activity with children," and that he is a pedophile who is "not cured of the condition." Pet. App. 3a.

Following the hearing, the jury found "beyond a reasonable doubt" that Hendricks is a "sexually violent predator," and the presiding judge ordered Hendricks committed to Larned State Hospital. *Id.* at 4a. Hendricks remains at Larned to this day, where he continues to receive treatment for his mental abnormality/personality disorder.

Hendricks appealed the commitment order to the Kansas Supreme Court. The appeal challenged the constitutionality of the Act on various grounds, including that the Act fails to provide substantive or procedural due process

and equal protection of the laws, is void as overly broad and vague, and violates the prohibition against double jeopardy and *ex post facto* laws. *Id.* at 9a. The Kansas Supreme Court reached only the substantive due process issue; it struck down the Act (by a 4-3 vote) as a violation of the substantive due process right to be free from unwarranted restraints on personal liberty. Pet. App. 1a-59a. Citing this Court's decision in *Foucha v. Louisiana,* 504 U.S. 71 (1992), the Kansas court held: (1) the Due Process Clause prohibits civil detention in the absence of a finding that the detainee is *both* mentally ill and dangerous; and (2) the finding that Hendricks has a "mental abnormality or personality disorder" is insufficient to demonstrate that he is mentally ill. *Id.* at 17a-20a.

In granting both the certiorari petition and Hendricks's cross-petition, the Court has agreed to address not only the substantive due process issue but also two issues the Kansas Supreme Court declined to address: whether the Act violates the constitutional prohibitions against *ex post facto* laws and double jeopardy. *Amici* address only the substantive due process issue.

SUMMARY OF ARGUMENT

Kansas contends that the Act does not violate substantive due process rights because it permits civil detention only after the State has demonstrated *both* that the detainee would be dangerous if set free *and* that the detainee's dangerousness derives from a mental illness. Kansas contends that a showing that a person suffers from a diagnosable "mental abnormality or personality disorder" is a sufficient showing of "mental illness" to satisfy whatever restrictions the Fourteenth Amendment's Due Process Clause imposes on a state's power to impose civil restraints

on individual liberty. Petitioner's Brief at 37-49. *Amici* fully support that argument.

Amici would go one step further regarding a state's power to impose such restraints. *Amici* submit that a state's interest in protecting its citizens from crime is sufficiently compelling that, in appropriate circumstances, it may incapacitate those found highly likely to commit crimes of violence. A state's interest in protecting its citizens does not vary depending on whether a dangerous individual happens to suffer from mental illness. Accordingly, it makes no sense to prevent a state from protecting its citizens from an individual shown to be virtually certain to commit violent crimes in the future, simply because the individual happens to be sane.

Amici recognize that preventive detention laws pose a serious threat to individual liberty unless carefully circumscribed. *Amici* do not support the right of a state to incapacitate an individual indefinitely based solely on ill-defined fears that the individual might break the law in the future. Nonetheless, such laws are permissible provided: (1) they are limited to cases in which the legislature has a strong basis for predicting the detainee's dangerousness; (2) they are not designed to punish past misbehavior; and (3) the detention is subject to mandatory periodic review.

The Kansas Sexually Violent Predator Act meets all of those requirements. The Act does not mandate preventive detention for all dangerous individuals, only for those who are highly likely to commit violent sex crimes -- a crime which the Kansas legislature has found to be subject to very high recidivism. The Act ensures that only the most dangerous individuals are detained, by limiting potential detainees to those who: (1) have been convicted or

charged with a sexually violent offense; and (2) suffer from either a "mental abnormality or personality disorder" which makes them likely to commit sex crimes. Nothing in the Act suggests an intent to punish individuals for past misconduct; the Act speaks only of a desire to prevent future crime, and Hendricks has produced no evidence suggesting a basis for doubting the Kansas legislature's good faith on that score. Finally, the duration of detention under the Act is strictly limited; those detained must be released as soon as they are "safe to be at large," and in no event may they be held for more than one year unless a judge has reviewed their situations and found them to be a continued threat to public safety.

The Court has repeatedly upheld civil commitment and other significant restraints on personal liberty without regard to whether those committed are mentally ill. The Kansas Supreme Court's holding that due process limits civil commitment to the mentally ill is a misreading of *Foucha* and other decisions of this Court.

ARGUMENT

I. DANGEROUS INDIVIDUALS DO NOT POSSESS A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM PREVENTIVE DETENTION OF LIMITED DURATION

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987)(quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits a state to protect its citizens by imposing finite periods of detention on those who have been found beyond a reasonable doubt to be highly likely to commit sexually violent crimes if not detained.

Amici recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations de-

signed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Id. at 26. *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson*, 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring)("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court has recognized in *Schall v. Martin*, 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall*, 467 U.S. at 264 (quoting *De Veau v. Brainsted*, 363 U.S. 144, 155 (1960))(emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

Youngberg v. Romeo, 457 U.S. 307, 320 (1982).

This balancing process was played out in detail in *Salerno*, in which the Court upheld pretrial detention of those charged with serious federal crimes as a means of preventing them from committing additional crimes. Among the factors cited by the Court as tipping the balance in favor of upholding the pretrial detention law were: (1) the detention was limited in duration -- it could not continue beyond trial; (2) only those charged with particularly serious crimes could be held; and (3) the government was required to show that the detainee presented a demonstrable danger to the community and that no conditions of release would reasonably assure community safety. *Salerno*, 481 U.S. at 750. The Court noted:

> There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.

Id. at 747-748.[1]

Each of the three factors cited by *Salerno* as tipping the balance in favor of civil detention in that case are present in this case. First, no one may be indefinitely committed under the Act. Rather, one year is the maximum amount of time that an individual can be forced to remain incapacitated pursuant to a single judicial proceeding. If Kansas wishes to continue the detention beyond one year, the presiding judge must determine that there is *no probable cause* to believe that the detainee no longer presents a danger, or the finder of fact must again determine *beyond a reasonable doubt* that the detainee is a sexually violent predator. Moreover, the detainee is entitled to immediate release under the Act if, at any time, (s)he is adjudged "safe to be at large." K.S.A. § 59-29a07.

Second, the Act is limited to a very small class of dangerous individuals: those who are likely to commit violent sex crimes. The Kansas legislature has not engaged in a blunderbuss effort to sweep all potential undesirables from the streets; rather, it has focused its attention on a particularly destructive type of violent crime and on a group the legislature has found to be particularly prone to recidivism. As the Court recognized in *Schall*, the government's interest in preventive detention is particular strong

[1] Among the cases cited by the Court for that proposition were *Ludecke v. Watkins*, 335 U.S. 160 (1948)(approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909)(rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection); and *Carlson v. Landon*, 342 U.S. 524, 537-542 (1952) (detention of potentially dangerous resident aliens pending deportation proceedings). *Salerno*, 481 U.S. at 748.

when those being detained are part of a group with high rates of recidivism. *Schall*, 467 U.S. at 265.

Third, the Act limits civil detention to those few for whom an extremely strong showing of dangerousness can be made. The Act's "beyond a reasonable doubt" standard of proof (a much stricter standard than the "clear and convincing evidence" standard often used in commitment statutes) significantly limits the group of dangerous individuals who can be made subject to the Act. Moreover, the Act requires significantly more than evidence of past bad acts in order to prove a likelihood of future misconduct. Kansas must also demonstrate that the propensity to commit violent sex crimes is based on a "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." K.S.A. § 59-29a02(a). Tying the finding of future dangerousness to medical evidence regarding the detainee's mental condition significantly improves the precision of the dangerousness prediction at the same time that it restricts the pool of those subject to detention.[2]

Amici recognize that no prediction of future dangerousness can be 100% accurate. But as the Court has recognized, the potential imprecision of such predictions is not grounds for prohibiting all government action. For

[2] By pointing approvingly to the "mental abnormality or personality disorder" requirement, *amici* do not mean to suggest that some type of mental defect need be demonstrated in order to justify civil detention. Rather, *amici* view that requirement as simply one method by which a state can tip the constitutional balance in favor of a preventive detention measure, both by narrowing the potential for intrusion on individual liberty and by increasing the likelihood that detention will actually promote public safety.

example, while recognizing uncertainty among psychiatrists regarding whether a mentally ill person who has committed a criminal act is likely to commit additional criminal acts (and thus whether the person should be civilly committed based on dangerousness), the Court in *Jones v. United States*, 463 U.S. 354 (1983), rejected claims that such uncertainty prohibits legislatures from addressing the issue:

> We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . ." *Greenwood v. United States*, 350 U.S. 366, 375 (1956). . . . The lessen we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

Jones, 463 U.S. at 364 n.13. *See also Schall*, 467 U.S. at 278 ("Our cases indicate. . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.").

Finally, there is no indication that Kansas adopted the Act as an indirect method of imposing additional punishment on convicted criminals -- a purpose, *amici* submit, that would violate substantive due process principles as well as the prohibition against double jeopardy. The Act speaks only of the desire to prevent future crime. The public outcry that led to adoption of the Act arose not because of a perception that those committing violent sex

crimes were being insufficiently punished, but because public safety was being endangered by the State's inadequate efforts to keep dangerous people off the streets. *See* Respondent's Brief at 5-6. In the absence of evidence that the Act "promotes either of the traditional aims of punishment -- retribution and deterrence" (*Allen v. Illinois*, 478 U.S. 364, 370 (1986)), there is no reason to view the Act as anything other than a civil statute designed to deter crime.

In sum, Hendricks has failed to demonstrate that Kansas's curtailment of his individual liberty under the facts of this case "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Salerno*, 481 U.S. at 751 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) or otherwise "shocks the conscience" (*id.* at 746); accordingly, his continued detention does not violate his substantive due process rights.[3]

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[3] The Court has stated that "evidence that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice" offends basic principles of justice and thus violates substantive due process. *Schall*, 467 U.S. at 268. It is worth noting, therefore, that laws prescribing civil commitment for sex offenders have a lengthy pedigree in this country. As Kansas notes (Petitioner's Brief at 23), by 1960 at least 26 states had adopted some form of civil commitment law for sex offenders. The Court rejected a due process challenge to one such law, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). As the *amicus curiae* brief filed by the State of Washington, *et al.*, indicates, a number of states have in recent years adopted laws substantially similar to the Kansas Sexually Violent Predator Act. It is difficult to believe that so many state legislatures would have adopted such laws if such laws objectively could be said to offend our nation's basic notions of justice.

II. NEITHER *ADDINGTON* NOR *FOUCHA* ESTABLISHES MENTAL ILLNESS AS A PREREQUISITE FOR CIVIL COMMITMENT

Key to the Kansas Supreme Court's decision to strike down the Act was its holding that due process prohibits civil detention in the absence of findings that the detainee is *both* mentally ill and dangerous. The court based that holding on *Foucha v. Louisiana*, 504 U.S. 71 (1992), and to a lesser extent, on *Addington v. Texas*, 441 U.S. 418 (1979). The Kansas court misconstrued both opinions.

Addington involved a challenge to a Texas statute that permitted involuntary commitments to state mental hospitals based on "clear and convincing evidence" that the those to be committed both were mentally ill and posed a danger to themselves or others. The case turned on the proper standard of proof. The detainee argued that due process demanded that no commitments should be made on less than a "beyond a reasonable doubt" standard of proof, but the Court upheld Texas's use of a "clear and convincing" standard of proof. *Addington*, 441 U.S. at 431.

A number of courts -- including the Kansas Supreme Court in this case (Pet. App. 11a-12a) -- have erroneously interpreted *Addington* as holding that civil detention is never permitted in the absence of findings of both mental illness and dangerousness. *Addington* held no such thing. Rather, the Court merely stated that "[u]nder the Texas Mental Health Code" Texas had no interest in confining someone in a mental hospital in the absence of findings of both mental illness and dangerousness. *Id.* at 426. That statement was an unremarkable interpretation of Texas law; in any event, it is difficult to fathom why a state would want to place someone who is not mentally ill in a facility

designed to treat the mentally ill. But *Addington* cannot be read as prohibiting all civil detention among those not adjudged mentally ill; to interpret it in this manner would be to assume that the Court was intending to overrule *sub silentio* all the case (cited above) that have upheld civil detention in the absence of a mental illness finding.[4]

The Kansas Supreme Court's reading of *Foucha* was equally misguided. *Foucha* involved a challenge to the continued confinement of an individual acquitted of burglary charges by reason of insanity, following a post-trial determination that the individual was no longer mentally ill. This Court held that due process prohibited Louisiana from continuing to confine Foucha based solely on his failure to demonstrate that he was no longer dangerous. *Foucha*, 504 U.S. at 81-82.

Foucha contains language indicating that civil detention of those not mentally ill is disfavored under the Due Pro-

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[4] Such an interpretation of *Addington* is particularly implausible when one considers that its author, Chief Justice Burger, just four years earlier in *O'Connor* stated that "[t]here can be little doubt" that "a State may confine individuals solely to protect society from the dangers of significant antisocial acts." *O'Connor*, 422 U.S. at 582-583 (Burger, C.J., concurring). Moreover, one would have expected the Court to provide some explanation if it really had intended to adopt such a novel and seemingly illogical rule. It makes little sense to decree that neither a state's interest in protecting its citizens nor its *parens patriae* interest in providing treatment to the mentally ill is *ever* sufficient by itself to justify civil detention -- yet also to decree that the two interests, when combined, for some reason *are* sufficient to withstand substantive due process challenge. Logic suggests that as the threat to public safety continues to increase, at some point a state's interest in protecting its citizens would be sufficient by itself to tip the constitutional balance in favor of civil detention.

cess Clause (*see, e.g., id.* at 84 & n.6), and that language is obviously relevant to this case. But *Foucha* affirmed *Salerno*'s holding that civil detention is fully justified in appropriate circumstances even in the absence of a mental illness finding. *Id.* Accordingly, the Kansas Supreme Court clearly misread *Foucha* in reading into that decision a mental illness requirement for civil detention.

Moreover, the facts in *Foucha* are sufficiently distinguishable from the facts of this case as to render *Foucha* largely inapposite. In particular, the *only* finding in *Foucha* that bore even remotely on Foucha's future dangerousness was the not-guilty-by-reason-of-insanity verdict in his initial criminal case. But while that verdict indicated that on one occasion Foucha had committed a crime, evidence of one bad act in the past (standing alone) is a questionable evidentiary basis for a finding of future dangerousness. Moreover, the Louisiana courts had never required the State to provide any evidence of future dangerousness; rather, they ordered Foucha's continued confinement because *he* had failed to demonstrate that he was *not* dangerous. Thus, *Foucha* can best be seen as standing for the limited proposition that one is not subject to civil confinement when the state has neither proved that he is mentally ill nor proven that he is dangerous.[5]

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[5] *Foucha* distinguished *Salerno* by noting that civil detention in *Salerno* was limited to those charged with a small number of "the most serious of crimes," while Louisiana permitted detention of *all* insanity acquittees, regardless how minor the charge. *Foucha*, 504 U.S. at 81. In that respect, this case is far more akin to *Salerno* than to *Foucha*: Kansas has limited its detention statute to those likely to commit one extremely serious type of crime: violent sex crimes.

Finally, *Foucha*'s limited reach is underscored by the concurring opinion of Justice O'Connor, who provided the essential fifth vote for the Court's discussion of due process issues. Justice O'Connor made clear that her real objection to Louisiana's conduct was its continued treatment of Foucha as a mental patient after it had determined that he was not mentally ill. *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment). She observed that the result might have been different if Louisiana had recognized that the only reason for holding Foucha was his dangerousness and had acted accordingly:

> Louisiana evidently has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a clinical finding of sanity, and that judgment merits judicial deference.
>
> It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of the detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness.

Id. at 87-88 (O'Connor, J., concurring in part and concurring in the judgment).

Kansas has followed Justice O'Connor's direction: it has tailored the nature and duration of the detention of those held pursuant to the Act to reflect, for the most part, concerns regarding the dangerousness of those being held. Accordingly, nothing in *Foucha* dictates the result reached by the Kansas Supreme Court.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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